SUPREME COURT, U.S.
FILED
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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-891

KENT SAXON,

Petitioner,

versus

ERLE JOHNSTON AND
THE SCOTT COUNTY TIMES, INC.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSISSIPPI

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSISSIPPI

Petitioner, Kent Saxon, prays that a Writ of Certiorari issue to review the judgment entered by the Supreme Court of Mississippi affirming the decision and opinion rendered by the Scott County Circuit Court, being Mississippi Supreme Court Cause No. 51,277, issued on May 30, 1979, and the order overruling the petition for rehearing entered on July 11, 1979.

OPINIONS BELOW

The Supreme Court of Mississippi did not issue a formal opinion in this cause, but rather affirmed the written opinion entered by the Circuit Court of Scott County issued on October 3, 1978 (Appendix A).

JURISDICTION

The judgment of the Supreme Court of Mississippi was rendered on May 30, 1979 (Appendix B). A petition for rehearing was denied on July 11, 1979 (Appendix C).

Jurisdiction of the Supreme Court of the United States is invoked pursuant to 28 U.S.C. §1257(3).

QUESTIONS PRESENTED

1. Does the sustaining of a demurrer finding that the Petitioner is a quasi public figure without an evidentiary hearing deny Petitioner due process of law under the provisions of the Fourteenth Amendment of the United States Constitution, and if so, does this finding require total dismissal of this type of proceeding or is Petitioner allowed to produce proof to meet the greater burden of providing malice and recklessness in accord with recent decisions of the Supreme Court.

CONSTITUTIONAL PROVISIONS INVOLVED

Constitution of the United States
Amendment XIV, Section 1

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF FACTS

On February 27, 1978, Petitioner filed a libel suit in the Circuit Court of Scott County, Mississippi, against Erle Johnston and the Scott County Times for certain publications concerning the Petitioner.

The Respondents filed an Answer, plea in bar, and general demurrer on April 5, 1978. On September 15, 1978, the cause was heard regarding the plea in bar and general demurrer.

The trial court, without affording Petitioner an evidentiary hearing and considering matters outside the scope of the pleadings, found that the Petitioner was a

"quasi public figure" and sustained the demurrer of the Respondents resulting in the dismissal of Petitioner's libel action.

The Petitioner appealed the lower court's sustaining of the demurrer and the Supreme Court of Mississippi affirmed the trial court's action on May 30, 1979. The Supreme Court of Mississippi denied a rehearing of this cause on July 11, 1979.

REASONS FOR GRANTING THE WRIT

Petitioner respectfully asserts that he was denied due process of law in that even minimal standards require that a hearing be meaningful and not a mere shallow event. *Goldberg v. Kelly*, 397 U.S. 254, 90 S.Ct. 1011, 25 L.Ed.2d 257 (1970), *Fuentes v. Shevin*, 407 U.S. 67, 92 S.Ct. 1983, 32 L.Ed.2d 556 (1972). The trial court found Petitioner to be a "quasi public figure" based solely on unsworn allegations attributed to Petitioner and the contents of the pleadings.

Under Mississippi law, the Petitioner's declaration stated a cause of action. Petitioner charged that Respondents published false, vicious, and libelous articles and he was injured thereby, and that such articles were motivated by actual malice. Petitioner further included, as an exhibit, copies of the front page of Respondents' newspaper. Pursuant to the Mississippi Code, Annotated, Section 11-7-53 (1972) and Mississippi Code, Annotated, Section 95-1-1 (1972) the declaration stated a cause of action. (Appendix D).

The Respondents filed an Answer and demurrer, inter alia, admitting the publications but denying the malice and reckless disregard for truth or falsity of the published statements.

A hearing was had on the demurrer wherein the Court considered matters outside the scope of the pleadings and dismissed the Petitioner's declaration. A demurrer may not "speak" so as to become a type of summary judgment and only matters contained in the declaration and the demurrer may be heard. *King v. Mississippi Power & Light Company*, 142 So.2d 222 (Miss. 1962) and where there is a question of fact the cause should proceed on the merits even though the demurrer is technically sustainable, *Deaton v. Delta Democrat Publishing Company*, 326 So.2d 471 (Miss. 1976).

For argument purposes even if Petitioner admits he is a "quasi public figure", of which there has been no proof, *Times Inc. v. Firestone*, 424 U.S. 448, 96 S.Ct. 958, 47 L.Ed.2d 154 (1976), he respectfully asserts that to summarily dismiss his cause of action violates due process of law as set forth in the Fourteenth Amendment to the United States Constitution.

The trial court held in dismissing this suit, in part:

> "The Federal Courts have preempted the field of libel and slander and have established that hatred, ill will, enmity, intent to harm, or negligence are insufficient to establish malice

> toward those involved in discussions on public issues. That the Defendants are protected under the First and Fourteenth Amendments of the United States Constitution, unless the Plaintiff shows malice. . . . . ."

Petitioner asserts that he was not allowed to prove the "actual malice" standard set forth in *New York Times Company v. Sullivan*, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964). The decision of the Mississippi Supreme Court affirming the lower court's action further denies Petitioner the standards set forth in *Herbert v. Lando, et al*, 435 U.S. 922, Slip Opinion 77-1105, decided April 18, 1979, in meeting the higher burden of his proof which decision further denies Petitioner due process of law.

It cannot be stated that due process requires a total dismissal of Petitioner's action, rather Petitioner should be allowed to proceed, if necessary upon a higher burden of proof, to prove his case. The First and Fourteenth Amendments to the United States Constitution do not require a dismissal of this cause of action and Petitioner should be allowed to continue his case in the trial courts of Mississippi, in accord with the sound and recent decisions of the United States Supreme Court.

CONCLUSION

For the above stated reasons, Petitioner respectfully prays that this Petition for a Writ of Certiorari be granted.

Respectfully submitted,

_____

KENT SAXON, Pro se

_____

JAMES J. FOUGEROUSSE,
Of Counsel
1214 Capital Towers,
Jackson, MS 39205

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have mailed three copies of the foregoing Petition for Writ of Certiorari to the Supreme Court of Mississippi to Honorable O. B. Triplett, P.O. Box 247, Forest, MS 39074, by United States mail, properly addressed and postage prepaid, this the ____ day of December, 1979.

_____

JAMES J. FOUGEROUSSE

APPENDIX A

Circuit Court of Scott County, Mississippi

KENT SAXON

versus C.A. No. 4855

ERLE JOHNSTON and
THE SCOTT COUNTY TIMES, INC.

Filed: Oct. 3, 1978

OPINION

This matter is before the undersigned Special Judge by appointment and commission of the Governor of the State of Mississippi to specially hear and determine this cause of action arising in Scott County, State of Mississippi.

By agreement of the parties the cause was heard in vacation on September 15, 1978, on a plea in bar and general demurrer. The plea in bar went to the allegations set forth and contained in items 3, 4, 6 and 7 of the charges of the declaration and upon the hearing the Plaintiff, Kent Saxon, acknowledged that the plea of the one-year statute of limitations was well taken and the allegations thereof was for the sole purpose of a charge of malice so the court finds that the allegations thereof are barred by the one-year statute of limitations and the fact of the case should not have been pleaded.

The above can well be appreciated by this Judge and this being a Pro Se proceedings by the Plaintiff, Kent Saxon, a layman, he did an excellent job in framing his pleading to not be learned in the law.

It is an honor to be confronted and have a man with the principals and strong belief in his principals as Saxon evidenced to the Court to there appear and forcifully [sic] present the issues as well as many lawyers.

It is most unfortunate that so many times great men disagree and because of this become disagreeable with one another. It is good to have issues discussed and published so basic truths can be determined from the disagreements by followers of those disagreeing. And this Judge can well appreciate the hurt feelings of the Plaintiff, Saxon who evidenced to this court many basic principals of integrity and fair play that the younger generations have allowed to be eroded away in the mores of community life and relationships as well as that of the law.

This court is therefore confronted with the following question. Does the bill of complaint of Saxon against Erle Johnston as Editor and Individually and against the Scott County Times, Inc., state a cause of action under the laws of Mississippi for libel? In order to meet the requirements of the law this Judge must assume that all facts well pleaded are true. Therefore with this assumption in mind we must go to the basic issue which is a publication of the Scott County Times

as shown by publication date line of February 23, 1977, a photo copy of this being attached as an agreed exhibit to this opinion. The article as written and published is shown to be a news coverage of a Mayor and Board of Aldermen meeting for the City of Forest. Some issues were hot between some citizens of Scott County and the Mayor and Board of Aldermen. An insert in the coverage also shows that "Saxon Tried Vainly To Get Warrant For Mayor Beard's Arrest". So the basic issue is whether a quote of the Mayor as printed which is as follows: "We also have people like Kent Saxon, and others, who will play dirty pool in an effort to harm or discredit anyone who will not give in to them," constituted libel on behalf of the Editor and the Scott County Times. Many of the allegations in the pleadings were conclusions of the pleader, and were not admitted on demurrer. Griffith, Mississippi Chancery Practice, 2nd Ed., Sec. 288; Love v. Fidelity & Deposit Co. of Maryland, 162 Miss. 532, 139 So. 387.

The Federal courts have pre-empted the field of libel and slander and have established that hatred, ill will, enmity, intent to harm or negligence are insufficient to establish malice toward those involved in discussions on public issues. That the defendants are protected under the First and Fourteenth Amendments of the United States Constitution, unless the plaintiff shows malice by proving that the defendant when he published the words (1) either knew they were false, or (2) published them in reckless disregard of whether true or not. Reaves v. Foster, 200 So.2d 453 (Miss.) (1967). Our Supreme Court of the State of Mississippi has held that:

"The right of action given by the law for libel and slander is based on the recognition that the enjoyment of a good reputation is a valuable one accorded to every citizen. The deprivation of this right through false hood and malice is actionable. But not ever [sic] stricture is actionable. When a person comes prominently forward in any way and becomes a public or quasi-public figure, he invites free expression of public opinion, including criticism. When the criticism is in the form of an opinion, relates to public assertions or acts rather than to the individual in his private affairs, is fair in the sense that the reader can understand the factual basis for the opinions containing the criticism, and the publication relates to a matter of public interest, then the occasion is conditionally privileged; *and no action will lie for such publication no matter how severe the criticism or unfavorable the comments, if the privilege is not abused.*" See Edmonds v. Delta Democrat Publishing Company, 93 So.2d 171 (1957); Boydstun v. State, 249 So.2d 411 (Miss.) (1971). Also the many authorities cited in the above cases.

The pleadings show that Saxon have [sic] for several years been constantly a worker in the political arena and joined issues with other [sic] and therefore assumed the position of a quasi-public figure and in doing this the above law is applicable to the issue.

The Demurrer is therefore sustained and an order is entered with this opinion dismissing this cause of action.

/s/ W. W. BROWN
SPECIAL JUDGE

APPENDIX B

Supreme Court of Mississippi

No. 51,277

KENT SAXON

versus

ERLE JOHNSTON and
THE SCOTT COUNTY TIMES, INC.

Filed: May 30, 1979

JUDGMENT

This cause having been submitted at a former day of this Term on the record herein from the Circuit Court of Scott County and this Court having sufficiently examined and considered the same and being of the opinion that there is no error therein doth order and adjudge that the Judgment of said Circuit Court ren-

dered in this cause on the 3rd day of October, 1978 — be and the same is hereby affirmed. It is further ordered and adjudged that the appellant do pay all of the costs of this appeal to be taxed for which let proper process issue.

APPENDIX C

Supreme Court of Mississippi

No. 51,277

KENT SAXON

versus

ERLE JOHNSTON and
THE SCOTT COUNTY TIMES, INC.

Filed: July 11, 1979

ORDER

The Petition for rehearing filed in the above styled cause is hereby denied.

APPENDIX D

Miss. Code of 1972 §11-7-53. Declaration for libel or slander

In actions for libel or slander, the plaintiff may aver that the words or matter complained of were used in a defamatory sense, specifying such sense, without any prefatory averment to show how such words or matter were used in that sense; and such averment shall be put in issue by the denial of the alleged libel or slander. Where the words or matter set forth, with or without the alleged meaning, show a cause of action, the declaration shall be sufficient.

Miss. Code of 1972 §95-1-1. Certain words actionable.

All words which, from their usual construction and common acceptation, are considered as insults, and calculated to lead to a breach of the peace, shall be actionable; and a plea, exception or demurrer shall not be sustained to preclude a jury from passing thereon, who are the sole judges of the damages sustained; but this shall not deprive the courts of the power to grant new trial, as in other cases.

Supreme Court, U. S.
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ON PETITION FOR A WRIT FOR CERTIORARI TO THE SUPREME COURT OF MISSISSIPPI

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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OPINIONS BELOW

The opinion of the Circuit Court of Scott County, Mississippi, the judgment rendered thereon, and the judgment by the Supreme Court of Mississippi affirming the judgment entered below without rendering an opinion, are attached to the Petition for Certiorari as Appendices A, B and C, respectively.

JURISDICTION

Jurisdiction of this Court is invoked by petitioner under Title 28, United States Code, Section 1257(3), which authorizes this Court to take jurisdiction to review the judgment of the Supreme Court, when but only when it affirmatively appears that a Federal question was presented to the Supreme Court of Mississippi and that its decision of the Federal question was necessary to its determination of the cause.

STATUTES INVOLVED

The only Federal statute involved is Title 28, United States Code, Sec. 1257(3).

QUESTIONS PRESENTED

1. If the Supreme Court found that the demurrer was well taken and that the declaration stated no cause of action, could it affirm the case before it and ignore the comments of the Circuit Judge to the effect that the petitioner was a "quasi public figure"?

2. Stated differently, can the Supreme Court of Mississippi affirm a judgment of a lower court even though it finds that the reasoning of the lower court was unsound?

3. Since there was no allegation that plaintiff was a quasi public figure contained in the declaration filed by him in the State Court and reviewed by the State Supreme Court, was there any Federal question presented to the State Supreme Court which it necessarily decided when it affirmed the judgment of the lower court sustaining the demurrer filed by the defendants?

STATEMENT OF FACTS

The facts have been correctly stated by petitioner. The plea in bar concerned publications complained of which occurred more than one year prior to institution of the libel action; and petitioner conceded that they were barred by limitations.

There was no allegation in the declaration which would remotely justify a conclusion that petitioner was a "quasi public figure". The trial court stated in its opinion that it could look only to the allegations contained in the declaration but then erroneously referred to petitioner as a quasi public figure because of allegations contained in an affirmative defense in the answer of respondents.

ARGUMENT

The Demurrer

Petitioner filed his declaration for libel under Mississippi Code of 1972, Section 11-7-53. He did not invoke the provisions of Mississippi Code of 1972, Section 95-1-1, making actionable the publication of insulting words calculated to lead to a breach of the peace. This is a special statute known as "Actionable Words Statute"; and is commonly known as the "Anti-Dueling Statute". While the Actionable Words Statute provides that no demurrer shall be interposed to prevent the jury from passing upon the question as to whether said words are within the statute, the Mississippi Court has repeatedly held that the declaration may be tested by a demurrer. In *Tattis v. Carthans*, 215 So. 2d 685 (Miss. 1968), the Supreme Court said:

> "In actions brought under this statute, the Court has the power to pass on the demurrer where the demurrer

is not based upon a construction of the words but on some other ground evidenced by the declaration."

The Supreme Court made this additional comment:

> "To apply the statute literally, the use of any words, without reference to the occasion or purpose of their use, which, from their usual construction and acceptation, are considered as insults and calculated to lead to a breach of the peace, would be actionable. To so construe the statute would reduce it to an absurdity and prevent one from using words of the character condemned by the statute when necessary to be used in asserting or defending in good faith a claim to right or duty. This Court has uniformly declined to so construe the statute."

Therefore, even if the declaration had charged the use of "actionable words" and not libel, the declaration was reviewable on a general demurrer.

Since *Tattis v. Carthans* was decided in 1968, and the Actionable Words Statute (Appendix D) was re-enacted by the Mississippi Code of 1972, the Legislature of Mississippi adopted the construction placed thereon by the Supreme Court. *Burks v. Moody,* 107 So. 279, 141 Miss. 370.

The Opinion and Decision of the Trial Court

The Supreme Court of Mississippi in *King v. Mississippi Power & Light Company,* 142 So. 2d 222, 244 Miss. 486, prescribed the prerogative of the trial court:

> "When a demurrer is presented to a trial court, only the declaration and the demurrer are looked to, and the latter cannot be aided by an answer or other pleading. White v. Turner, 197 Miss. 265, 19 So. 2d

> 825. Moreover, on demurrer, all material allegations in a declaration are considered as true."

The trial court recognized this rule of law in his opinion but then departed from it with remarks that had no bearing upon his consideration of the demurrer.

The Function of the State Supreme Court

In *Foreman v. Oberlin,* 75 So. 2d 56, 222 Miss. 42, a demurrer was filed to the original bill of complaint and the trial court sustained the demurrer on erroneous reasoning. The Supreme Court, finding that the decree sustaining the demurrer was correct although the supporting grounds and reasoning were unsound, affirmed the decree of the lower court with this comment:

> "Where the chancellor bases his final decree or any other decree, on one ground which is insufficient or erroneous, if there be another ground upon which the decree may be supportive, it must be affirmed. Griffith's Miss. Chancery Practice 2d ed., Note: p. 743; Lee v. Memphis Pub. Co., 195 Miss. 264, 14 So. 2d 351."

The duty of the Mississippi Supreme Court when a lower court makes a correct decision on erroneous grounds, is given the following statement in *State ex rel. Patterson v. Board of Supervisors of Prentiss County,* 234 Miss. 26, 105 So. 2d 154:

> "The denial of the writ and the dismissal of the petition was erroneous on the ground assigned by the lower court; however, if the lower court reached the right result in denying the writ and dismissing the case, this court should affirm the judgment, even if the lower court assigned erroneous reasons for its conclusions. Carney v. Anderson, 214 Miss. 504, 58

So. 2d 13, 59 So. 2d 262, 38 A.L.R. 2d 981. It follows that this court must, when it finds the assigned grounds erroneous, look to the whole case and determine if any other ground for affirmance is present."

Lack of Federal Court Jurisdiction

Since it is conceded by petitioner and by respondents that the declaration contained no allegation that petitioner was a "quasi public figure", and since it is conceded by all parties that the trial court rested his comment that petitioner was a "quasi public figure" upon mere allegations in the answer and not upon the allegations contained in the declaration, and since the Supreme Court, in reviewing the case of petitioner on appeal, had the power and duty to affirm the decision if the judgment of the lower court was correct although the grounds assigned were erroneous, it follows that no Federal question whatsoever was determined by the Supreme Court of Mississippi.

The test of jurisdiction which this Court has consistently applied is laid down in *Lynch v. New York*, 293 U.S. 52, 55 S.Ct. 16, 79 L.Ed. 191:

> "It is essential to the jurisdiction of this court in reviewing a decision of a court of a state, that it must appear affirmatively from the record, not only that a federal question was presented for decision to the highest court of the state having jurisdiction, but that its decision of the federal question was necessary to the determination of the cause, and that it was actually decided or that the judgment as rendered could not have been given without deciding it."

Should it be contended that the action of the Supreme Court of Mississippi in affirming the judgment of the lower court without a decision necessarily approved of the erroneous reasoning of the trial court, this Court in *Stembridge v. State of Georgia*, 343 U.S. 541, 72 S.Ct. 834, 96 L.Ed. 1130 made the following reply:

> "Where the highest court of the state delivers no opinion and it appears that the judgment might have rested upon a non-federal ground, this court will not take jurisdiction to review the judgment."

A similar situation was presented to this Court in *Cuyahoga River Power Company v. Northern Realty Company*, 244 U.S. 300, 37 S.Ct. 643, 61 L.Ed. 1153, to which this Court responded:

> "We so conclude because, looked at from the point of view of the action of the trial court and of the court of appeals, this case presents a single question of what principle is to be applied where, from an absence of an opinion expressed by the court below, it is impossible to say whether its judgment was rested upon state questions adequate to sustain it independent of the Federal questions, or upon such Federal questions, both being in the case. But the rule which controls such a situation has long prevailed and was clearly expressed in Allen v. Arguinbau, 198 U.S. 149, 49 L.Ed. 990, 25 S.Ct. 622 where a writ of error to the Supreme Court of Florida was dismissed as follows: 'The Supreme Court of Florida gave no opinion, and, therefore, we are left to conjecture as to the grounds on which the pleas were held to be bad; but if the judgment rested on two grounds, one involving a Federal question and the other not, or if it does not appear on which of two grounds the judgment was based, and the ground independent of a Federal question is sufficient in itself to sustain it, this court will not take jurisdiction.' "

CONCLUSION

For the reasons assigned, respondents respectfully pray that this petition for a Writ of Certiorari be denied.

Respectfully submitted,

O. B. TRIPLETT, JR.
P. O. Box 247
Forest, Mississippi 39074
Attorney for Respondents

CERTIFICATE OF SERVICE

I hereby certify that I have mailed three copies of the foregoing Brief in Opposition to the Petition for Certiorari to the Supreme Court of Mississippi, to Honorable James J. Fougerousse, Attorney, 1214 Capital Towers, Jackson, Miss. 39205, by United States Mail, properly addressed and postage prepaid, on this 20th day of December, 1979.

O. B. TRIPLETT, JR.
Attorney for Respondents